UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 634

Case No. 685: HORLACHER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 14 August 1992, David E. Horlacher, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To rescind the decision of the Secretary-General ... dated 26 May 1992, rejecting the Applicant's request for reimbursement of income taxes imposed by authorities of the United States that will be levied on the lump sum withdrawal benefit received from the United Nations Joint Staff Pension Fund;

(b) To order the Secretary-General to reimburse the Applicant for payment of the income taxes actually paid on the lump sum withdrawal from the United Nations Joint Staff Pension Fund...;

(c) To order the Secretary-General to reimburse the Applicant for all fees, costs and disbursements in the preparation and presentation of the case, ...;

(d) To order the Secretary-General to reimburse the Applicant for interest on the amount to be reimbursed...;

(e) To fix the appropriate amount of compensation payable to the Applicant for the injury sustained by him in case the Secretary-General should decide in the interest of

the United Nations that the Applicant should be compensated without further action being taken in this case."

Whereas the Respondent filed his answer on 31 August 1993;

Whereas the Applicant filed written observations on 20 December 1993;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, entered the service of the United Nations on 1 December 1974, on a three-month short term appointment at the L-4, step VI level, under the 200 Series of the Staff Rules. The appointment was extended for an additional fifteen months, through 31 May 1976, making the Applicant a participant in the United Nations Joint Staff Pension Fund (the Pension Fund). The Applicant separated from the service of the United Nations on 31 May 1976. Between 31 May 1976 and 30 September 1979, the Applicant was a consultant to the United Nations and as such, was not entitled to participation in the Pension Fund.

On 21 April 1980, the Applicant received a two-year fixed term appointment as a staff member at the P-5, step 1 level, thereby again becoming a participant in the Pension Fund. He thereupon exercised his right to restore his prior contributory service from 1 March 1975 through 31 May 1976, in accordance with the provisions of article 24 of the Regulations of the Pension Fund, then in force.

The Applicant's appointment was extended, successively, through 20 April 1987, 31 August 1991 and 31 January 1992, when he separated from the Organization.

The General Assembly, in its resolution 34/165, decided "that any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations

Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

In a memorandum dated 29 May 1990, the Applicant asked for a ruling from the Office of Programme Planning, Budget and Finance on whether he was eligible for reimbursement of United States income taxes in respect of any lump-sum pension payment he might receive upon retirement from the United Nations. The Applicant referred to the "Guide to National Taxation of UNJSPF Benefits with Special Reference to the United States Tax".

On 20 May 1991, the Chief, Income Tax Sub-Unit, Accounts Division, transmitted to the Applicant a copy of a memorandum dated 26 April 1991, from the General Legal Division, Office of Legal Affairs, advising that the Applicant was "not eligible to be reimbursed U.S. income taxes paid in respect of any lump sum payment he might receive from the Pension Fund" on the ground that when the Applicant was appointed on 21 April 1980, he was not reinstated but was given a "new" appointment within the meaning of staff rule 104.3(a). The terms of the Applicant's "new" appointment governed the question of his eligibility for reimbursement of taxes paid in respect of his lump-sum retirement benefit. Under the terms of the Applicant's new appointment, income taxes paid by him on the lump-sum retirement benefit could no longer be reimbursed, as the General Assembly, in its resolution 34/165, had prohibited such reimbursement to any staff member who joined the Organization after 1 January 1980.

On 14 June 1991, the Applicant requested the Secretary-General to review the decision and on 13 August 1991, he lodged an appeal with the Joint Appeals Board (JAB).

In a memorandum dated 20 November 1991, the Representative of the Secretary-General informed the Secretary of the JAB that on the basis of a memorandum of 13 August 1991, from the Director of the General Legal Division, the Organization was prepared "to reimburse the appellant for taxes paid on the pro-rated lump sum portion of his pension benefits as it pertains to his service with the United

Nations prior to 1 January 1980", but not for the portion attributed to his employment after 1 January 1980.

On 21 November 1991, the Secretary of the JAB informed the Applicant of that decision.

On 28 January 1992, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 11 February 1992. Its considerations and recommendation read, in part, as follows:

"Considerations

12. The Panel noted that ... the heart of the matter before it (...) is the application of the paragraph in Part III of General Assembly resolution 34/165 (...), ... Having carefully examined the resolution, the Panel acknowledged that its text was ambiguous.

13. ...

14. Although the Panel had agreed from the outset that it should base its decision on its understanding of the text of the resolution, and not on a reading (or interpretation) of what the drafters had intended to say, it did explore the avenue proposed in the memorandum of 13 August 1991, from the Director, General Legal Division, of legislative history and intent. ... The Panel noted that if it was the intent of the General Assembly to end reimbursement for staff members appointed after 1 January 1980, that was accomplished by the first clause of part III of the resolution. Given the legislative history which included notably the various Tribunal judgements dealing with acquired rights, there was no need to specify that those appointed prior to 1 January 1980 and in continuous service at and after that date maintained their entitlement. If the second clause had any operative content, it was precisely with respect to such staff members as Appellant.

15. Finally, it considered the submission of Respondent (...) that Appellant is not entitled to reimbursement because the cited General Assembly resolution is 'part of his terms of employment.' Clearly, the second clause of part III of the resolution is just as much part of his terms of employment as is the first. And if the second clause applies to Appellant, then the first is immaterial.

16. The Panel concludes, therefore, that Appellant, who was serving with the United Nations prior to 1 January 1980, is entitled to receive reimbursement for national income taxes paid on any lump sum payment he may receive from the United

Nations Joint Staff Pension Fund. In arriving at this conclusion, the Panel was also guided by the principle that, as the drafter of any text is responsible for its clarity, any ambiguity must be interpreted in favour of the other party.

Recommendation

17. The Panel recommends that the Secretary-General confirm that Appellant is entitled to receive reimbursement for national income taxes paid on any lump sum payment he may receive from the United Nations Joint Staff Pension Fund."

On 26 May 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that you are entitled to receive reimbursement of national income taxes paid on any lump sum payment you may receive from the United Nations Joint Staff Pension Fund. However, bearing in mind that:

(a) General Assembly resolution 34/165 of 17 December 1979, decided that any staff member joining the United Nations Secretariat on or after 1 January 1980, shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund, and that this decision will not affect staff members serving with the United Nations prior to 1 January 1980;

(b) after separating from service on 31 May 1976, you received a second appointment on 21 April 1980;

(c) your second appointment was a new appointment within the meaning of staff rule 104.3(a), its terms being fully applicable without regard to any period of former service;

(d) it would be an unwarranted reading of the resolution to interpret it as preserving for all time in the future the right to reimbursement of income taxes on the entire amount of lump sum pension payments when the right to a substantial part of those payments did not exist before 1 January 1980, the Secretary-General cannot accept the recommendation made by the Board. He has decided that you should receive reimbursement for

> income taxes paid on the pro-rated lump sum portion of your pension benefits as it pertained to your service prior to 1 January 1980, but not for the portion pertaining to your service after 1 January 1980."

On 14 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant acquired the right to be exempt from the first clause of General Assembly resolution 34/165, Part III, by virtue of his 18 months of service, from 1 December 1974 through 31 May 1976.

2. The Applicant had a legitimate expectation to reimbursement of national income taxes on his lump-sum retirement benefit.

3. As the Applicant had acquired the right to tax reimbursement, the Respondent is obliged to reimburse him for the national income taxes on his entire lump-sum retirement benefit, and not just on that portion of the benefit which is attributable to his service prior to 1 January 1980.

Whereas the Respondent's principal contentions are:

1. Under the express wording of General Assembly resolution 34/165, Part III, the Applicant is not entitled to reimbursement for national income taxes payable on that portion of his lump-sum retirement benefit attributable to his service performed under an appointment he received after 1 January 1980.

2. The history of the enactment of resolution 34/165 clearly shows that the General Assembly intended to exempt from the prohibition on reimbursement of national income taxes only those staff members who had been in service prior to 1 January 1980, and remained so on that date.

3. The Applicant is entitled to reimbursement only for national income taxes for the portion of his lump-sum pension benefit attributable to his service until 31 May 1976. The

Administrative Tribunal has found no difficulty in ordering the pro-rating of such tax reimbursement in prior cases.

The Tribunal, having deliberated from 23 June to 6 July 1994, now pronounces the following judgement:

I. The Applicant seeks rescission of a decision by the Respondent dated 26 May 1992, rejecting the Applicant's request for reimbursement of income taxes imposed by the United States Government on the lump sum withdrawal benefit from the United Nations Joint Staff Pension Fund (the Pension Fund). The Tribunal is also asked to order the Respondent to reimburse the Applicant for those taxes actually paid by him, together with interest and costs. The decision appealed awarded the Applicant reimbursement only on the portion of such taxes paid on the lump sum withdrawal benefit allocable to service rendered prior to 1 January 1980. The basis for the decision is the Respondent's interpretation of General Assembly resolution 34/165 of 17 December 1979, which provides that:

> "... any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

II. The Applicant had been a staff member of the Organization from 1 December 1974 until 31 May 1976, when he separated from service. He participated in the Pension Fund from 1 March 1975 until his separation. He later rejoined the Organization on 21 April 1980 and served for approximately 11 years until his retirement. He had restored his prior 1974-76 service under article 24 of the Pension Fund Regulations. Under staff rule 104.3(a), his 1980 appointment was not a reinstatement, but a new appointment.

III. The Applicant contends that, regardless of his having been newly appointed after 1 January 1980, the mere fact that he had been in the service of the Organization a few years prior to that date, entitles him to full reimbursement because staff members serving with the Organization prior to 1 January 1980 were, pursuant to the terms of the General Assembly resolution, to be unaffected by it. The Respondent disputes this interpretation. Thus, the issue before the Tribunal involves a determination of the meaning of the resolution.

IV. The Tribunal considers that the language of the last clause of the resolution, relied upon by the Applicant, is unclear. It might be construed either, (i) as providing for total or partial reimbursement to staff members in the service of the Organization prior to 1 January 1980 and continuing in its service thereafter; or (ii) as providing for total or partial reimbursement to staff members who were in the service of the Organization at any time prior to 1 January 1980, regardless of when or for how long and, who rejoined the Organization on or after 1 January 1980. Given the ambiguity in the pertinent language of the resolution, the Tribunal will examine its background and purpose to assist it in determining its intended meaning. Cf. Judgement No. 437, Ahmed (1988).

V. The Applicant advances what he describes as three major contentions in support of his claim to entitlement to reimbursement for all United States income taxes paid by him on the lump sum pension benefit he received from the Pension Fund. His first contention is that, by entering the service of the Organization on 1 December 1974, he acquired the right to be exempt from the first clause of General Assembly resolution 34/165. His second contention is that, having acquired the right to be exempt from the first clause, he had a legitimate expectation of tax reimbursement. His third major contention is that, by his having acquired the above-mentioned right and the above-mentioned legitimate expectation, the Organization, in turn, became obliged to reimburse the full amount

of the income taxes following his reemployment by the Organization and the restoration of his prior contributory service. His contentions are variously based on his letter of appointment, General Assembly resolution 34/165, Judgement No. 320, Mills (1983), Judgement No. 373, Saddler (1986), Judgement No. 237, Powell (1979), a 1974 staff information circular, a 1979 Secretary-General's Bulletin, and article 28 of the Pension Fund Regulations.

VI. With respect to the Applicant's first contention, there is no doubt that, when he came into the service of the Organization in 1974, his letter of appointment and the applicable Staff Regulations and Rules provided him a contractual entitlement to reimbursement of income taxes on lump sum withdrawal of pension benefits. That this provision of the Staff Regulations and the Staff Rules was lawful, was settled by Judgement No. 237, Powell (1979). However, that judgement also pointed out in paragraph XIV that:

> "'Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82, Puvrez).'"

VII. It follows from this that an amendment of the applicable Staff Regulations and Staff Rules which abolished the right to reimbursement would be permissible with regard to pension benefits resulting from service after such an amendment, but could not be applied retroactively with respect to pension benefits resulting from service prior to the amendment. Since the decision in this case does not deprive the Applicant of tax reimbursement with respect to the lump sum benefit allocable to service rendered prior to the change in the tax reimbursement system mandated by the General Assembly with effect from 1 January 1980, principles relating to acquired rights are not dispositive in this case. Nor

is it material whether, as he contends, the Applicant had an expectation during the 1974-1976 period or later with regard to the extent to which income taxes on a lump sum pension benefit would be reimbursable to him by the Organization. What is material is the effect of General Assembly resolution 34/165 on this case.

VIII. By way of background, the Powell case supra, in which the question of the legality of reimbursement by the Organization of income taxes levied on lump sum pension benefits was before the Tribunal, arose because in 1978, the United States, in various communications to the Organization, challenged the validity of that practice. The Office of Legal Affairs agreed with the position of the United States and so advised the Secretary-General, who suspended reimbursement, pending a determination by the Tribunal. In the Powell case, the issue was presented to the Tribunal and it rejected the various arguments put forth by the Respondent and the United States (an amicus curiae). The Tribunal held that, under the regulatory structure existing prior to the suspension, such tax reimbursement was lawful. That was the central issue before the Tribunal.

IX. The Tribunal's decision in Powell led to efforts by the United States, supported by others in the General Assembly, to obtain corrective legislation to prevent future reimbursement of such taxes by the Organization. It appears that when the resolution proposed to achieve this purpose was under consideration by the Fifth Committee in November 1979, the effective date for the change being contemplated was 1 January 1980. There was concern, however, about the situation of staff members in the service of the Organization. This was voiced by both the representative of the Federal Republic of Germany, which had introduced the proposed resolution, and by the Under-Secretary General for Administration, Finance and Management. The former spoke in terms of protecting acquired rights as the reason for the last clause of the proposed resolution. The latter spoke of protecting the interests of staff

members as of the date of the implementation of the new arrangements in terms of staff "currently on board." (See, Summary Record of the 60th Meeting, Fifth Committee, 27 November 1979, paras. 61 and 70).

X. Neither statement provides a definitive explanation of the precise intent of the General Assembly regarding the meaning of the second clause. The isolated comment of the representative of the Federal Republic of Germany regarding acquired rights, viewed in the light of what was said on that subject by the Tribunal in Powell (a decision that was plainly in the forefront of the consideration being given to the proposed resolution), would seem to suggest a more restrictive interpretation of the second clause than is compelled by its language. Such a narrow interpretation would also appear to be inconsistent with the intention reflected by the comments of the Under-Secretary General for Administration, Finance and Management. Accordingly, neither the statements referred to above nor the language of the resolution persuade the Tribunal that the General Assembly's intention was to deal with acquired rights solely as described in Powell, para. XIV, supra.

XI. The Applicant asserts that the resolution is clear in that it deals with only two classes of staff members: those who joined the Organization after 1 January 1980, without any prior service and those who also joined the Organization after 1 January 1980, but who had service performed prior to that date. According to the Applicant, the latter are entirely exempt from the prohibition against reimbursement of taxes set forth in the first clause of the resolution. The Tribunal is unable to accept this simplistic approach since it does not fairly take into account the main objective of the General Assembly. The Tribunal finds that the primary and overriding focus of the General Assembly was on discontinuance of tax reimbursement. The persons to be adversely affected by this discontinuance were all who joined the staff on or after 1 January 1980. But there was obviously concern about providing a degree of protection for persons who were serving staff

members on that date. Nothing before the Tribunal suggests that this concern related to individuals who were not then serving staff members of the Organization, but who had at some time in the past, whether briefly or not, been staff members, or that there was any reason for such a concern. The Tribunal does not accept the extraordinary proposition that the General Assembly, by the second clause of the resolution, wished to confer a potentially large windfall benefit on anyone appointed after 1 January 1980 who, although not in service at the time the resolution took effect, had served, however briefly, at any time in the past. In order to ascribe such an unusual intent to the General Assembly, the Tribunal would have to find that there was no other interpretation more in harmony with the dominant theme of ending tax reimbursement after 1 January 1980, which underlay the resolution. The Tribunal is unable to make such a finding.

XII. An entirely reasonable interpretation of the second clause of the resolution is possible which is in keeping with the General Assembly's purpose of discontinuing tax reimbursement and at the same time protecting staff members who then had a lively interest in the issue, i.e., those serving when the resolution became effective on 1 January 1980, and who continued to serve thereafter. In the Tribunal's view, the General Assembly wished to preserve tax reimbursement for those staff members both with respect to service before and after 1 January 1980. Without the protection intended by the second clause of the resolution, questions might have been raised concerning such a staff member's eligibility for tax reimbursement with respect to lump sum benefits allocable to service after 1 January 1980. It is understandable that the General Assembly might wish to continue the entitlement of such staff members to tax reimbursement. Since the Applicant was not within this category, the Tribunal is not called upon to address, in this case, the effect of the resolution on any staff member in the protected category who separated after 1 January 1980, but at a later date rejoined the Organization.

XIII. As construed above, the resolution implements the General Assembly's objective regarding new appointments after 1 January 1980, while at the same time generously protecting the expectations of staff members serving at the time the resolution became effective and continuing to serve thereafter.

XIV. The Applicant cites the decisions of the Tribunal in the Mills and Saddler cases as supporting his position. The Tribunal does not agree. In Saddler, the Applicant had not been in the service of the United Nations on 1 January 1980. He separated on 15 July 1978. There was no issue in that case as to the applicability of General Assembly resolution 34/165, since he did not rejoin the Organization. Instead, in 1981, he entered the service of one of the specialized agencies, and he was not governed by United Nations Staff Regulations and Rules. In that case, the Tribunal recognized the propriety of reimbursement to the Applicant with regard to the portion of the taxes paid by him on his lump sum benefit which was allocable to his service with the United Nations prior to 1980. In the present case, the Respondent's decision provides for similar tax reimbursement to the Applicant. It is therefore consistent with Saddler.

XV. Similarly in Mills, the Applicant had served in the United Nations from 1946 until 1979, when he transferred to a specialized agency where he was employed until his retirement in 1981. Thus, as in Saddler, the Applicant in Mills had not been in the service of the United Nations on 1 January 1980 and did not rejoin the UN after that time. General Assembly resolution 34/165 therefore had no bearing on that case either. In Mills, the Tribunal concluded that the Applicant was entitled to tax reimbursement with respect to the portion of his lump sum pension payment allocable to his period of service with the United Nations. That, too, is consistent with the Respondent's decision in the present case. The Applicant here is being reimbursed for taxes on the portion of his lump sum pension payment that is allocable to his service with the United Nations

prior to 1 January 1980, and that is all that he is entitled to. For him to receive a greater tax reimbursement would unjustifiably distort the purpose of the General Assembly in adopting resolution 34/165.

XV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 6 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary